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Civil Rights in the Dependencies

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CIVIL RIGHTS IN THE DEPENDENCIES

BY

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A. B. University of Chicago, 1897

THESIS

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I HEREBY RECOMMEND THAT THE THESIS PREPARED UNDER MY SUPERVISION BY

Charles King Bliss

ENTITLED *Civil Rights in the
Dependencies.*

BE ACCEPTED AS FULFILLING THIS PART OF THE REQUIREMENTS FOR THE

DEGREE OF *Master of Arts.*

J. M. Garner
In Charge of Major Work

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Recommendation concurred in:

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A review of the history of the United States to the year 1898 shows no insurmountable difficulties in the application of the provisions of the Constitution to newly acquired territory. The powers necessary to the government of dependencies, were assumed by Congress. Said Chief Justice Marshall, ^{#1} "The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and hold territory. Could this position be contested the Constitution of the United States declares that, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." ^{#2} The provisions in the treaties of cession guaranteed the civil status of new territory. Civil rights were extended to the peoples coming into the American Union through the action of Congress in carrying out the treaty provisions.

The treaty by which we acquired Louisiana contained the clause, " The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." ^{#3}

Like provisions are found in the treaties governing the Florida, Mexican and Alaskan acquisitions. In the treaty ceding Mexico it was provided that, "The Mexicans who shall not preserve the character of citizens of the Mexican Republic shall be incorporated into the Union ^{of}

#1- Lere and Laralde v Pitot and others, 6 Cranch 332.

#2- Constitution of the United States, Art. 4, sec.3.

#3- Louisiana Treaty of 1803, Art. III; Haswell Treaties, p. 562

the United States, and be admitted at the proper time (to be judged by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution, and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.^{#1}"

There seems to have been little question of the plenary power of Congress to govern the territories. President Jefferson decided that the limitations of the Constitutions upon the Federal legislative power applied only to the exercise of those powers with reference to the states when Louisiana was acquired. As far as territories of the United States were concerned the powers of Congress were unrestricted. This view generally prevailed in the legislation enacted. At the time of the Mexican cession it was claimed by Calhoun that ceded territory became an integral part of the United States by virtue of the act of cession and that to such territory, the Constitution, with its safeguards to civil liberty extended "ex proprio vigore." This view was later upheld and given authority in the famous Dred Scott decision, declaring the Missouri Compromise unconstitutional. According to this view, states and territories were accorded a like status respecting constitutional limitations.

Notwithstanding the different opinions respecting the relation of our Constitution to the dependencies, the inhabitants of newly acquired territory were not long deprived of any constitutional benefits. They shared great civil privileges naturally. Except for Alaska, the new country was contiguous; the people were of the same race, customs, and religion as ourselves; No question as to their capability to assume the responsibilities of self-government, to

^{#1}- Art. IX, Treaty with Mexico, 1848.

enjoy in full the rights of citizenship, existed. The few tribal elements in Alaska offered no obstacle to the extension of civil rights. The treaty by which this territory became part of the United States contained the clause, "That the inhabitants of the ceded territory----with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities ~~of~~ citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion."^{#1}

In 1898, the Philippines, Porto Rico, and Guam fell into our possession as a result of the war with Spain. The same year, Hawaii was annexed by joint resolution of Congress. Tutuila, with its valuable harbor of Pago-Pago was acquired thru convention with Great Britain and Germany.

It was at once perceived that these new territories were in many respects unlike the old. A situation had been created which would be attended by not a few difficulties. The newly acquired territory had a people whose social and political condition was not of the same nature as our own. "The new peoples were different from us in religion customs, laws, methods of taxation, modes of thought, administration of government, and conception of justice."^{#2} The extension to them of rights and privileges of citizens of the United States could not be granted as in the case, without exception, of previously acquired dominion.

Old theories respecting the power of Congress over the territories naturally revived. "Ex proprio vigore" doctrines were re-expounded. One class of thinkers declared that the limitations imposed by the

^{#1} Art. III, Treaty with Russia, 1867, Haswell, pp 742

^{#2} Van Dyne, Citizenship of the United States, pp 171

Constitution apply only to the states and that the United States territorially, included only states; another school holding exactly opposite views, proclaimed that the limitations of the Constitution apply wherever the jurisdiction of the United States extends and all territory in the possession of the United States.

The treaty of cession with Spain made no provision for the incorporation of the new inhabitants as citizens of the United States. No express clause respecting status guaranteed the extension of civil rights, as we have seen, are found in previous instruments dealing with newly acquired territory. The treaty states simply, "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States, shall be determined by the Congress."^{#1}

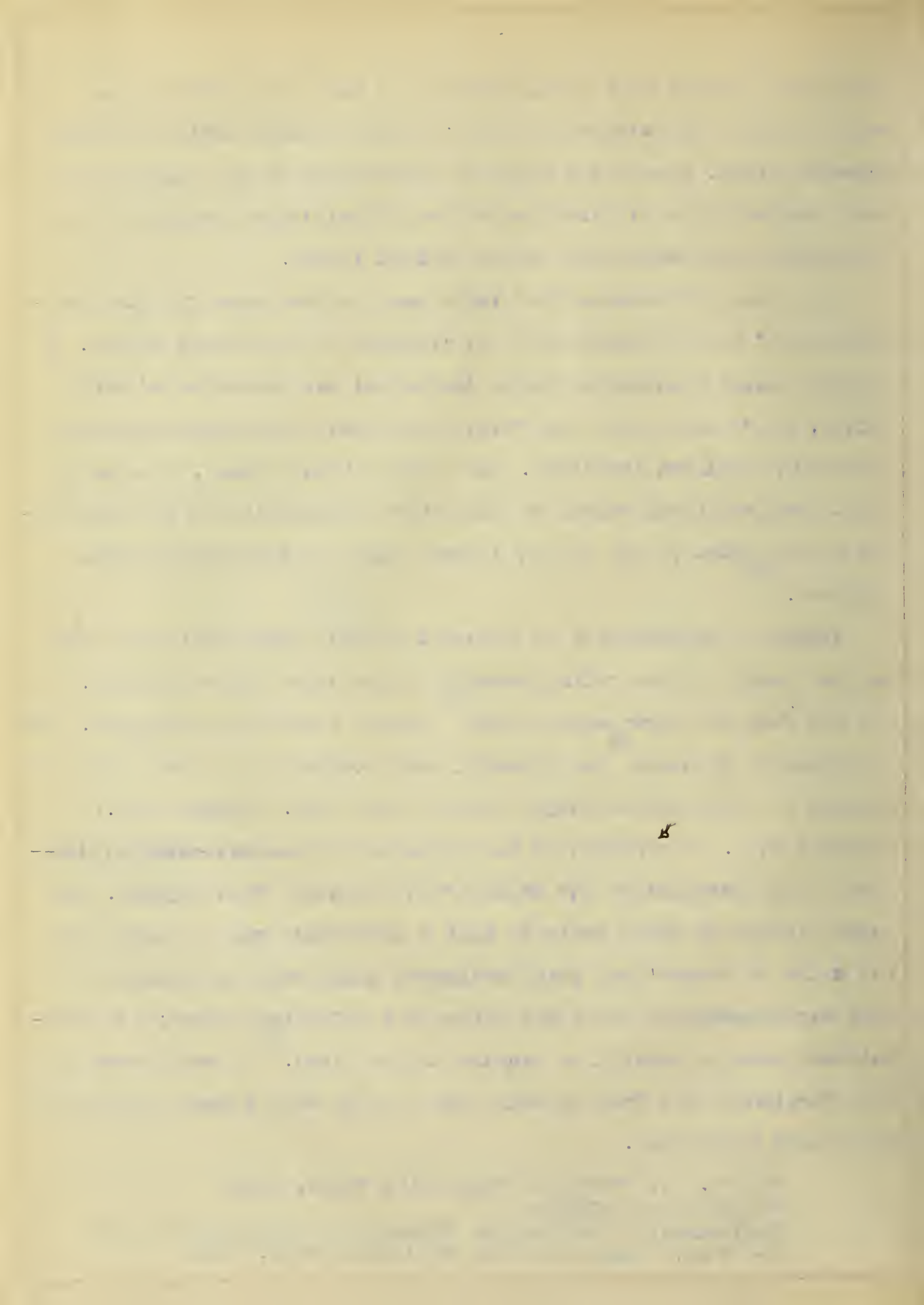
Rights in dependencies as affected by the legal relation of the subject people to the ruling power is by no means a new question. It was old when our first acquisition^{#2} caused a debate in Congress. What is termed by Sioussat^{#3} the "leading case" defining this relation, was decided by some English judges early in the 17th. century, viz., Calvin's Case. It referred to the situation of the post-nati in Scotland on the occasion of the union of that country with England. The judges stated in their decision that a dependency was "a parcel of the Realm in tenure" and that Parliament might make any statute to bind such dependency where the latter was definitely named; but without such special meaning, a statute did not bind.^{#4} It would seem then that Parliament was free to make such laws as were deemed fit for any particular dependency.

#1-Art. IX, Treaty of Peace with Spain, 1898

#2-Louisiana Purchase

#3-Sioussat, "The English Statutes in Maryland," II, 19

#4- Snow, "Administration of Dependencies." pp32



This attitude was also maintained in the case of *Blankard v. Galdy* which decided the status of the inhabitants of the colony of Jamaica. In the *Earl of Derby's* case decided shortly afterward, the court held that English statutes did not bind the inhabitants of the Isle of Man unless they were specially mentioned. ^{#1} We have the opinion of Attorney General West given in 1720, viz., "The common law of England is the common law of the plantations and all statutes in affirmance of the common law, passed in England antecedent ~~to~~ the settlement of a colony, are in force in that colony unless there is some private Act to the contrary; though no statutes, made since those settlements are thus in force unless the colonists are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear." ^{#2}

Blackstone maintained that in conquered or ceded countries (one of the numerous classes of dependencies of Great Britain) that have laws of their own, the king may, indeed, alter and change those laws, but till he does actually change them, the ancient laws of the country remain unless such as are against the laws of God. ^{#3} The orthodox doctrine is best stated as applied to Pennsylvania in 1718 in an act passed by the assembly of that colony, "Whereas it is a settled point that as the common law is the birthright of English subjects, so it ought to be the rule in British dominions; but Acts of Parliament have been adjudged not to extend to these plantations unless they are particularly named in such acts." ^{#4}

In the colony of Maryland, Dulany in his "The Right of the Inhab-

^{#1}- Sioussat, "English Statutes in Maryland" II, 20.

^{#2}- Chalner's Opinions, I, 194

^{#3}-Bl. Comm. Sec.4, 107.

^{#4}-Shepherd:Proprietary Govt. in Penn. 390(qt.fr.Sioussat)

-itants of Maryland to the Benefit of the English Laws," contends that all English citizens enjoy English laws, hence Marylanders being English citizens, must necessarily share their privileges. This important document which Sioussat^{#1} terms the only pamphlet devoted to the extension to the colonies of the laws of England, is clear in its argument that Maryland is an integral part of the British Empire; that they are entitled to equal rights enjoyed by all British subjects; that the English statutes are part of their inheritance; and long continued use and reception of these English laws, had, even without authority, worked to give them permanent force.

This contention of Dulany emphasizes to a degree the position of the English government with reference to the status of dependencies. It was considered necessary to make a formal extension of the English statutes to the colonies before they were binding. But the forms of the common law were acceded and gradually became accepted in all the colonies.^{#2}

No common law right received more consideration than trial by jury. It is found incorporated to a more or less extent into the constitutions of the early American states. Colonial records go to show it was considered an inalienable birthright, its limitation was one of the grievances of the colonists against the mother country. The Declaration of Independence declared its inviolability. The absence of a Bill of Rights in the Federal Constitution was used as an argument against its ratification and the grant of the first ten amendments securing the rights, brought about its approval by the requisite number of states. The meaning of the constitutional rights then agreed upon, has undergone change but none to the extent of the "Great

#1- Sioussat, English Statutes in Maryland, Ch. III

#2- Reinsch, "The English Common Law in the Early Am. Colonies."

bulwark of our civil and political liberties." ^{#1} A jury and jury trial were interpreted to mean the unanimous verdict of twelve "Liberos et legales homines." In some of the states the same rights were guaranteed by provisions that no man should be deprived of his life, liberty or property "but by the law of the land."

That the American people were exceedingly jealous of any curtailment of rights involving jury trial may be observed from the manner it was guarded by the decisions of the Supreme Court of the United States. As late as 1898, the decision in Thompson v Utah ^{#2} declared that a state constitution could not change the ancient rule of trial by jury found in the Sixth Amendment.

As a result of the Treaty of Peace with Spain in 1898, it was found incumbent upon the American people to define the legal relation which the superior power should, in the future, bear towards the newly acquired possessions of Porto Rico, Guam, the Philippines and Hawaii.

By the decisions rendered in the so-called "Insular Cases," ^{#3} the Supreme Court laid down the following propositions:-

- (1) The United States possesses power to acquire new territory to the same extent as any other nation.
- (2) AS a logical sequence of this power and the express provision of the Constitution that "Congress shall have power to dispose of and make all needful regulations and rules respecting the territory or other property of the United States," the United States has full authority to provide for the administration and government of such territory.

^{#1}- Parsons v Bedford, 3 Pet. 433-466; 2 Story's Const. 1779

^{#2}- Thompson v Utah, 170 U. S. 343

^{#3}- DeLima v Bidwell, 182 U.S. 1 ; Downes v Bidwell, 182 U.S. 244

- (3) The power to govern new territory is vested exclusively in Congress.
- (4) In the exercise of this power, Congress is subject to practically no limitations but may take such action in each case as it deems best.
- (5) That neither the Constitution, except those provisions relating to what may be called the fundamental rights of citizenship, such as for example, that of liberty of worship, nor the general statutes of the United States are extended to new territory by the mere fact of its acquisition, but only as they are expressly made applicable by legislative act.^{#1}

An examination of a number of cases shows a remarkable divergence of opinion on the part of the members of the Supreme Bench respecting the provision excepting fundamental rights of citizenship from the plenary power of Congress in the territories. Its interpretation sheds new light upon the constitutional status of dependencies and has been most potent in the development of the doctrine of incorporation now deemed the supreme law of the land.

^{#2}

In *Downes v Bidwell* it was held that the power to acquire territory allowed full prescription of the terms on which the incoming people would be received. The fact that special stipulations had been inserted in former treaties of cession in definition of the status of the new people "implied denial of the right of the inhabitants to American citizenship until Congress shall by further action, signify its assent thereto." The fear that unrestrained power on the part of Congress would lead to oppressive restriction of civil rights, was deemed not justified "in the action of Congress in the past or by the conduct of the British Parliament towards its outlying possessions since the American Revolution." It is suggested, however, that funda-

^{#1} Willoughby, "Territories and Dependencies of the U.S. pp.21.

^{#2} *Downes v Bidwell*, 182 U.S. pp. 244

-mental rights guaranteed by our Constitution and mostly found in the first ten Amendments, would be protected from arbitrary action by the Congress, but the logical inference from the absolute territorial ^{#1} clause would leave Congress unhampered by constitutional provisions. To quote from the decision, "The liberality of Congress in the past in legislating the Constitution into contiguous territory is responsible for the belief that the Constitution operates by its own force therein, but the Constitution itself is silent on the subject and precludes the idea that the Constitution attached to these territories as soon as acquired." The doctrine of incorporation was thus expounded, "The treaty making power cannot incorporate territory into the United States without the express or implied consent of Congress. It may insert in a treaty, conditions against immediate incorporation. On the other hand, when it has expressed in the treaty the conditions favourable to incorporation, they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfillment of such conditions cause incorporation to result. It must follow where, no conditions are provided in the treaty or provisions are made against it, incorporation awaits the wisdom of ^{#2} Congress.

In accordance with the provisions of the treaty with Spain, Congress defined the status of the inhabitants of Porto Rico and the Philippines which entitles them to the protection of the United States as citizens of their respective countries, not of the Republic entitled to the rights and privileges guaranteed in the Bill of Rights. In Porto Rico, citizens were held to be as follows:- " All inhabitants

#1- Constitution of the U.S. Art. 4, sec. 3

#2- VanDyne, Citizenship in the U.S. pp.217.

continuing to reside therein who were Spanish subjects on the 11th. day of April, 1899, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as have elected to preserve their allegiance to the crown of Spain on or before the 11th. day of April, 1900. in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the 11th. day of April, 1899 (30 Stat. at L. 1754) and they together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of "The People of Porto Rico." with governmental powers as hereinafter conferred, and with power to sue and be sued as such."^{#1}

It is to be observed that this act guarantees no more than the protection of the United States to citizens of Porto Rico and says nothing about constitutional privileges. It is similar in its import to the "most favored nation clause" in our national treaties with foreign countries. In the case of Re Gonzales,^{#2} it was held that a native woman of Porto Rico seeking admission to the United States, was still an alien "unless in an appropriate way she had since become naturalised"; that Congress had expressly provided by statute for the status of Porto Ricans (31 Stat. at L. 77) and that "This legislation has certainly not operated to effect the naturalisation of the petitioner as a citizen of the United States. Being foreign born and not naturalised, she was still an alien and subject to the provisions of the law regulating the admission of aliens who come to the United States."

^{#1}- 31 Stat. at L. 77, ch. 191.

^{#2}- Re Gonzales, 118 Fed. 941.

Practically the same definition of citizenship is given to the inhabitants of the Philippine Islands as in the case of Porto Ricans except that citizens of the United States residing therein are not mentioned. ^{#1} The status of an American citizen residing in any one of the outlying dependencies is an interesting question. According to the legislation of Congress, he would possess a dual citizenship. While residing in Porto Rico he would be possessed of the rights and privileges accorded any native Porto Rican. In the Philippines, to all intents and purposes of the Constitution, he would be a Filipino. Thus we have the anomalous situation of an American citizen being "outside the Constitution" while still an occupant of American territory. Says Justice Harlan, ^{#2} "According to the principles of the opinion just rendered neither the Governor nor any American officer in the Philippines, altho citizens of the United States, altho under an oath to support the Constitution, and altho in those distant possessions for the purpose of enforcing the authority of the United States, can claim, of right, the benefit of the jury provisions of Constitution, if tried for crime committed in those Islands. There are many thousand American soldiers in the Philippines. They are there by command of the United States to enforce its authority. They carry the flag of the United States and have not lost their American citizenship. Yet, if charged in the Philippines with having committed a crime against the United States. of which a civil tribunal may take cognizance, they cannot, under the present decision, claim of right a trial by jury."

One of the leading cases involving the question of the civil

^{#1}- 32 Stat. at L. Ch. 1369, Act of July 1, 1902.

^{#2}- Dorr v Unites States, 583 U.S.

rights of the inhabitants of dependent territory was a jury trial case decided by the Supreme Court in 1903, viz. Hawaii v Mankichi.^{#1} A review of this case affords a most interesting insight into the theories of the members of the court respecting the relation of our Constitution to dependencies and the inhabitants thereof. Briefly, the facts of the case are as follows:- Hawaii was annexed to the United States by joint resolution of Congress, July 7, 1898, by which it was expressly provided that, "The municipal legislation of the Hawaiian Islands not inconsistent with this joint resolution nor contrary to the Constitution of the United States, shall remain in force until the Congress of the United States, shall otherwise determine."

Mankichi committed the crime of manslaughter some time between the date of the annexation resolution and subsequent legislation of Congress respecting the constitutional status of the territory. He was tried and convicted according to a procedure customary in Hawaii. The Hawaiian laws provided for a trial on information without a grand jury and for a conviction upon a vote of a petit jury of nine men. The appellee claimed that the provisions of Article III, section 2, and Articles V and VI of the Constitution of the United States were applicable to his case but that he was denied them. A petition for a writ of Habeas Corpus brought the case to the Supreme Court which was called upon to decide (1) Whether the annexation resolution operated to make the constitutional provisions immediately applicable to Hawaii (2) If the Constitution did not operate, whether there were not certain limitations upon the powers of Congress by which certain fundamental rights could not be abrogated, one of which was trial by a constitutional jury.

^{#1}- Hawaii v Mankichi, 190 U. S. 197.

Counsel for the appellee in an able argument contended that the constitutional provisions were applicable to the Hawaiian Islands from the moment of annexation.(1) It was annexed by act of Congress, not by treaty. (2) The intention of Congress as manifested in its treatment of the Islands, was to extend all constitutional privileges and protection. (3) The resolution had abrogated all municipal legislation contrary to the Constitution of the United States. Much ingenious argument was advanced to show that Hawaii was incorporated thru extension of the Constitution by the Act of Annexation, thus placing the rights of the accused Mankichi in line with the decision of the court in the Downes v Bidwell case.

The justices denied the right of the petition by a vote of five to four. Justices White, McKenna and two others used the precedents cited in Downes v Bidwell and considered a trial by jury not essential because the joint resolution had not incorporated Hawaii, hence the constitutional provisions did not apply. Justice Brown concurred in the decision on the ground that, altho incorporation did entitle to the benefits of the Constitution and Hawaii was fully incorporated by the Newlands resolution, Mankichi should be denied the two rights in question because in his opinion, the Constitution must be formally extended to acquired territory by Congress before having effect.

Justice Brown held furthermore that trial by jury was not a fundamental right as it "concerns merely a method of procedure which sixty years of practice had shown to be suited to the conditions in the Islands. Justice Harlan dissenting in a separate opinion upheld the constitutional guarantees of life, liberty and property to all peoples coming under the jurisdiction of the United States. A new doctrine in constitutional jurisprudence, said he, had been declared

when trial by jury was not regarded as a fundamental right. As outlined in the preceding pages of this paper, the history of the form of procedure known as trial by jury does not accord with Justice Brown's opinion.

May 31, 1904, the case of Dorr v United States ^{#1} came up to the Supreme Court, involving the question whether trial by jury is not necessary to judicial procedure in the Philippines in the absence of a statute expressly conferring the right. It will be readily seen that some opinion would be cited in this case as to what limitations are to be applied to Congress in legislating for a dependency.

In accordance with the provisions of the treaty with Spain, Congress, by the Act of 1902, ^{#2} provided for the temporary civil government of the Philippines, by extending to the Islands such civil rights as were deemed convenient and expedient. Both indictment by grand jury and trial by petit jury were, however, omitted. An express provision was made to the effect that section eighteen hundred and ninety-one of the Revised Statutes of 1878 should not apply to the Philippine Islands. This section gives force and effect to the Constitution and laws of the United States, not locally inapplicable, within all the organised territories and every territory thereafter organised, as elsewhere within the United States. Practically all other constitutional safeguards to life and liberty were admitted. Section 5 of the Act provides, "that no person shall be held to answer for a criminal offence without due process of law." It is upon this provision that there is claimed in this case the right to a trial by jury.

#1- Dorr and Obrien v U. S., 583 U.S.

#2- 32 Statutes, 691.

The decision of the judges was controlled to a great degree by the Mankichi case in which it had been said that the constitutional clauses respecting trial by jury were not considered as limitations on the powers of Congress when providing government for the territories. Whatever limitations are provided, trial by jury is not one of them. "These limitations must be decided as to extent as they arise," says Justice Day in giving the opinion of the court. The doctrine of incorporation as laid down in *Downes v Bidwell* was reaffirmed. The doctrine was strengthened by the fact that Congress, on the assumption of a free hand in dealing with non-incorporated territories, had mentioned section eighteen hundred and ninety-one of the Revised Statutes as not applicable to the Islands.

The opinion of Justice Brown that trial by jury is not a fundamental right is by implication given some weight, in the decision. To quote, "In case of a fair and orderly trial being already provided for acquired territory or the inhabitants were unsuited to a form of procedure, even if, common in the United States, there would not only be no need of it, but if introduced, it might work prejudice." In other words, trial by jury in the dependencies was governed by a doctrine of political expediency or convenience and would be extended like other civil rights by Congress at the proper time. Justice Peckham in concurring distinctly states this view by asserting that as in the case of Mankichi in Hawaii, so in the Philippines, trial by jury is not a constitutional necessity.

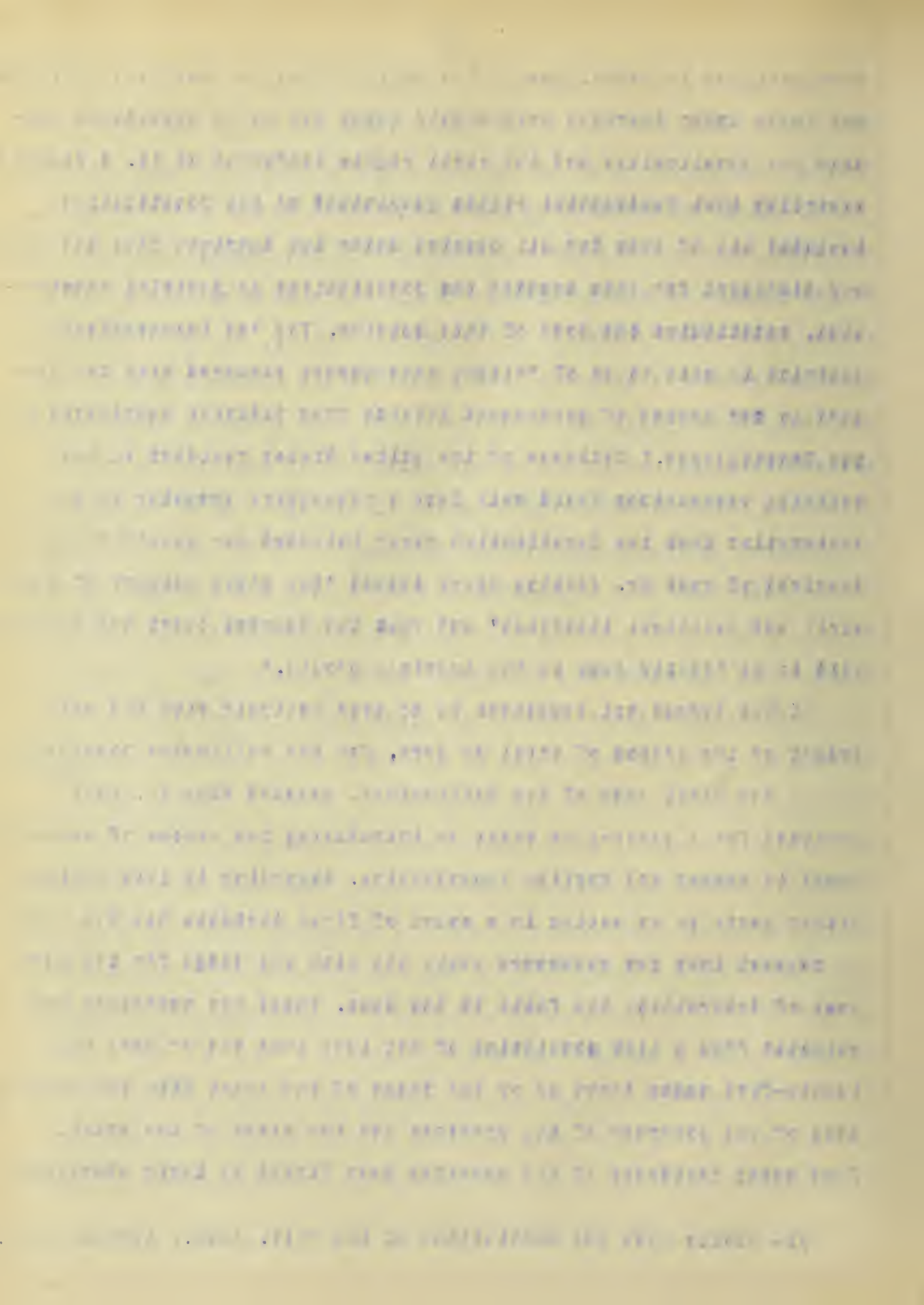
The opinion of Justice Harlan dissenting, reads much like that of the argument of Dulany^{#1} when contending for the English statutes in Maryland. As Englishmen in Maryland had not been banished; had not abjured England and had never swerved from their allegiance and hence

^{#1}-The Right of the Inhabitants of Maryland to the Benefit of Eng. Law

were entitled to advantages of the English laws, so American citizens and those under American sovereignty ought not to be considered outside the Constitution and the civil rights conferred by it. A vigorous assertion that fundamental rights guaranteed by the Constitution included all of them for all peoples under the American flag and that any disregard for them amended the Constitution by judicial construction, constitutes the body of this opinion. The "ab inconvenientem" doctrine is held to be of "slight consequence compared with the dangers to our system of government arising from judicial amendments of the Constitution." Citizens of the United States resident in the outlying possessions could well feel a responsive sympathy to the declaration that the Constitution never intended our people to be deprived of what Mr. Justice Story deemed "the great bulwark of their civil and political liberties" and what the Supreme Court had formerly held to be "justly dear to the American people."

It was deemed not expedient to do away entirely with the ends sought by the system of trial by jury, for the Philippine Commission^{#1} in the new Civil Code of the Philippines, enacted June 11, 1901 provided for a quasi-jury trial by introducing the system of assessors found in German and English dependencies. According to this system, either party to an action in a court of first instance has the right to request that two assessors shall sit with the judge for the purpose of determining the facts in the case. These two assessors are selected from a list consisting of not less than ten or more than twenty-five names drawn up by the judge of the court with the assistance of the governor of the province and the clerk of the court, from among residents of the province best fitted by their education,

#1- Public Laws and Resolutions of the Phil. Comm., 1901, Act 136.

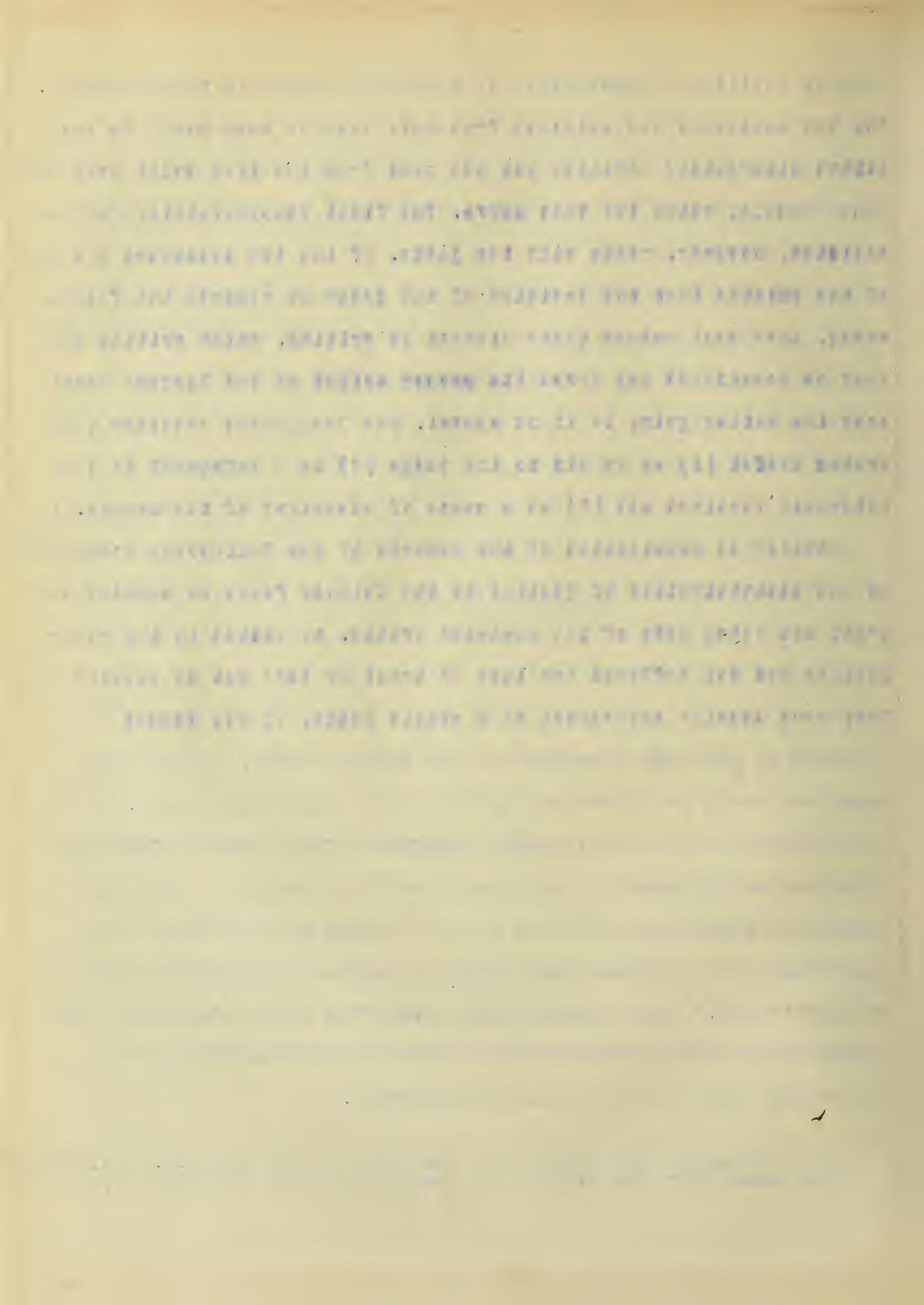


natural ability or reputation for honesty to serve in that capacity. The two assessors are selected from this list by each party to the action alternately striking out one name from the list until only two names remain, which two then serve. The final responsibility for the decision, however, rests with the judge. If the two assessors are both of the opinion that the decision of the judge as regards the facts, is wrong, they must reduce their dissent to writing, which writing will then be considered and given its proper weight by the Supreme Court upon the matter going to it on appeal. The Commission consider this system useful (1) as an aid to the judge (2) as a safeguard to the interests involved and (3) as a means of education of the people. #1

However an examination of the Reports of the Philippine Commission #2 on the administration of justice in the Islands fails to mention any great use being made of the assessor system. As stated in the report justice had not suffered for lack of trial by jury but as questions of fact were usually determined by a single judge, it was deemed wise to allow an easy way of appeal to the Supreme Court, so that such questions could be determined by review by seven eminent men. To quote "It is practically the unanimous judgment of all who are familiar with the local situation that the prevailing system is far better adapted to conditions existing in the Islands at the present time, than would be any system that could be devised involving introduction of jury trials." This opinion seems justified by the facts and lends weight to the "ab inconvenienti" construction of the Constitution respecting legislation for the dependencies.

#1- Willoughby-Territories and Dependencies of the U.S., pp. 222

#2- Reports of the Philippine Commission, 1906, part 3, pp. 4



That it was "the intention of Congress to carry some of the essential principles of American constitutional jurisprudence to the Philippines and engraft them upon the law of the people newly subject to the jurisdiction of the United States," is illustrated by the Kepner Case ^{#1} decided by the Supreme Court of the United States in 1904. Thos. E. Kepner was acquitted of the charge of "estafa" ^{#2} in a court of first instance but upon appellate proceedings by the government, was convicted in the Supreme Court of the Islands. Appeal was taken to the Supreme Court of the United States on the ground of violation of the constitutional civil right found in the Fifth Amendment. This provision had been expressly extended to the Philippines July 1, 1902 ^{#3} as found in section 5 of the act, "That no person for the same offence shall be twice put in jeopardy of punishment." This section is practically verbatim the language of the President's instructions to the Philippine Commission of April 7, 1900. These instructions read, "In all the forms of government and administrative provisions which they are authorized to prescribe, the Commission should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government.

At the same time the Commission should bear in mind, and the people of the islands should be made plainly to understand, that

#1- Thos. E. Kepner v U. S. 244 and 584 U. S.

#2- Local term--misuse of funds, embezzlement.

#3- 32 Stat--691.

there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. It is evident that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules and they will inevitably within a short time command universal assent. Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules.

" That no person shall be deprived of life, liberty or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; that no person shall be put twice in jeopardy for the same offence or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involun-

-tary servitude shall exist except as a punishment for crime; that no bill of attainder or ex post facto law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference, shall forever be allowed."^{#1}

Both the President and Congress therefore, fully agreed that the people of the Philippines should be given much of the protection of the Constitution affecting civil rights. Except for trial by jury, and the right of the people to bear arms, the instructions of the President extend the provisions of the first nine amendments of the Constitution. In addition, the instructions forbid slavery or involuntary servitude except as punishment for crime and prohibit the passage of a bill of attainder or ex post facto law.

In the Kepner case,^{#2} the government pleaded the provisions of the Spanish laws on the subject when the offence was committed, which viewed a person as not being in jeopardy in the legal sense until there had been a final judgment of the "audiencia."

The court in its decision declared that Congress in the Act of July 1, 1902, must be held to have intended to use the words respecting jeopardy in the well known sense as declared and settled by previous decisions of the court; therefore, a second trial after acquittal was contrary to section 5 of the act in question. In brief the Supreme Court decides this case by interpreting double jeopardy

^{#1}- Public Laws and Resolutions of the Phil. Comm., 6-9.

^{#2}- Kepner v United States, 244 U.S.

in the light of its constitutional meaning as laid down in former decisions, not according to what double jeopardy was understood to be in the past. To quote from the decision, "How could it be successfully maintained that these expressions of fundamental rights..... could be used by Congress in any other sense than that which has been placed upon them in construing that instrument from which they were taken."

Justice Brown dissented on the ground that the intention of Congress was to adopt the Spanish view of jeopardy in the extension of the right to the Islands; that by the decision, too great power would be placed in the hands of a single judge. Three other justices dissented by reason of inability to agree on the proper definition of double jeopardy. Said Justice Holmes dissenting, "Logically and rationally a man cannot be said to be more than once in jeopardy in the same cause however often he may be tried. There can be but one jeopardy in one case."

The importance of the act of Congress of July 1, 1902 cannot escape attention. This act is the authority for the civil rights allowed the Philippine Islands. By it, Congress makes clear its intentions and exercises the power to deal with the territories as it sees fit. Excepting the right of trial by jury and the right of the people to bear arms, there is extended the Bill of Rights of the Constitution of the United States. It repeals all acts and orders ^{#1} not in accordance with it. It becomes the Constitution of the Philippine Islands at the discretion of Congress, to grant, withhold or amend. But its provisions will be interpreted by the Supreme Court according to the principles governing the interpretation of the Constitution of the United States.

#1- Military Order 58 as amended by act 194 of the Phil. Comm. withholding double jeopardy clause from operation in the Islands.

Just how much influence political expediency exercised on the decision of the court is open to question. It would seem that, had the Spanish view of double jeopardy been upheld, appeals of a like character would have blocked the courts. According to the report of the ^{#1}Head of Finance and Justice the decision in the Kepner case had the effect of dismissing from the docket a number of cases in which such appeals had been taken. It is to be observed that the question of the right to a trial by jury is not presented in this case. It would be interesting to know, however, if it could be classed among those "expressions of fundamental rights which have been the subject of frequent adjudication in the courts of this country."

In the case of "In Re Ross" ^{#2} it was decided that trial by jury was not necessary to judicial procedure in a consular court in Japan. It was held that the constitutional guarantees applied only to citizens and others within the United States or who are brought there for trial for alleged offences committed elsewhere, not to residents and temporary sojourners abroad. To quote Justice Brown in the case, "The Constitution does not apply to foreign countries or to trials therein conducted and Congress may lawfully provide for such trials before ~~consular~~ tribunals without the intervention of a grand or petit jury." ^{#3} This case is held by counsel in the Mankichi case not to apply to our dependencies as the consular courts were tribunals set up in place of Japanese courts and acted wholly by permission of the Japanese government. Our territorial courts on the other hand, derive their authority wholly from the United States, thru the expressed will of Congress.

- #1- Reports, Phil. Comm. 1905, Part 4
- #2- In Re Ross, 140 U.S. 453
- #3- Hawaii v Mankichi, 190 U. S. 197

Of cases involving the question of civil rights in dependent territory, it remains to examine that of *Rasmussen v United States*.^{#1} This case was decided by the Supreme Court in 1905. One Rasmussen, a native of Alaska, took exception to the mode of trial provided by section 171 of the Code for Alaska^{#2} adopted by Congress, viz., a jury composed of six men and demanded a common law jury. This having been denied, upon conviction an appeal was taken to the Supreme Court of the United States. Reliance for a reversal of the decision of the Alaskan court was placed upon a violation of the Sixth Amendment. It is readily seen from the cases heretofore discussed that the application of the right demanded rests upon whether Alaska was or was not incorporated into the territory of the United States. The government as appellant denied such incorporation. A second contention was that, even if incorporated, the provisions of the Sixth Amendment did not apply to Alaska, being an unorganised territory.

The reasoning of the court leading to the decisions in *Hawaii v Mankichi* and *Dorr v United States* was here applied. The result was that Alaska was defined as a fully incorporated territory of the United States and as territory entitled to the civil rights guaranteed to such by the Constitution.

The treaty by which Alaska was acquired and the subsequent treatment of the territory by Congress, are factors of importance. Article III of the treaty with Russia^{#3} reads, "That the inhabitants of the ceded territory shall be admitted to the full enjoyment of all the rights, advantages and immunities of citizens of the United States." This treaty was the supreme law of the land. Subsequent legislation

#1- *Frederick Rasmussen v U. S.* 51 U.S.

#2- 31 Stat. 358

#3- Art. III, Treaty with Russia, 1867.

had brought about the incorporation of the territory.

We thus are introduced to the true criterion for judging the status of a dependency. If incorporated, it becomes an integral part of the territory of the United States. What constitutes incorporation may be gained from the acts of Congress respecting the dependency whether its treatment is such as to lead to its having an incorporated status. The treaty of cession or means of acquisition is all important. In *Hawaii v Mankichi*, annexation had not incorporated the territory as subsequent action of Congress in maintaining the existing custom duties and the laws respecting Chinese immigration into the United States, precluded such an intention by Congress. In *Dorr v United States*, the treaty of cession reserved the civil status of the acquired territory for ulterior action by Congress. Legislation subsequently shows the manifest intention of Congress not to incorporate the Philippines, for in the act providing a temporary civil government in the Islands, it was expressly stated that section eighteen hundred and ninety-one of the Revised Statutes of 1878 did not apply.

In the case under consideration, the treaty extended all the rights advantages and immunities of citizens of the United States to the incoming inhabitants. This may be termed the incorporation formula. It is pointed out in the decision that this formula is equivalent to a declaration of purpose to incorporate acquired territory into the United States, especially in the absence of other provisions showing an intention to the contrary. All treaties before 1898 involving the acquisition of territory, had embraced this formula in one form or another providing that the people should be incorporated into the Union and admitted to the rights of citizens. In the *Mankichi*

#1- Art. IX, Treaty with Spain, 1898.

case, it was claimed by counsel and denied by the court that Hawaii had been favored with the formula by the words of the Newlands resolution which declares that the Islands " be and they are hereby annexed as part of the territory of the United States."

Subsequent events prove that Congress carried out its declaration of purpose to incorporate Alaska (1) by the Act of July 20, 1868^{#1} concerning internal revenue taxation and (2) by the Act of July 27, 1868^{#2} by which the laws of the United States relating to customs, commerce and navigation were extended over Alaska and a collection district established therein. Such treatment, it will be recalled, had been withheld from the territories of Hawaii and the Philippines. The court further points out that by its own decisions, Alaska had been^{#3} accorded the status of one of the territories. An order of the court of May 11, 1891 had assigned the territory of Alaska to the Ninth Judicial Circuit. In the opinion of the justices in Binn v United States, " Alaska had been undoubtedly incorporated into the United States." ^{#4} In none of the cases discussed previously was the territory assigned to the jurisdiction of a court of the United States by including it in one of the regular judicial circuits. It is therefore made manifest that territorial courts per se are not considered courts of the United States within the meaning of that article of the Constitution treating of the judicial power, but any inclusion of them in a judicial circuit of the United States would be strong presumptuous evidence that such territory had been incorporated.

" That even if Alaska was incorporated into the United States, as it was not an organized territory, therefore the provisions of the

^{#1}- 15 Stat. 167, ch. 186, sec. 107.

^{#2}- 15 " . 240 " 237

^{#3}- Steamer *Orizaba* v United States, 163 U.S. 346.

^{#4}- Binn v U.S. 194 U.S. 486.

Seventh Amendment were not controlling upon Congress in legislating for Alaska." In its decision upon this point made by the government, the court allows for a distinction between incorporated and organised territories and defines in a general way the status of each. The government rested its contention on former decisions of the court that the civil rights guaranteed in the Fifth, Sixth and Seventh Amendments applied only to territories to which section eighteen hundred and ninety-one of the Revised Statutes of 1878, had been extended, viz. organised territories, of which Alaska was not one. For example, in the case of American Publishing Company v Fisher, the decision that the territorial law of Utah authorizing a verdict when nine jurors conferred, was invalid. rested solely on the ground that Congress had by Act of Sept. 9, 1850, extended the Constitution and laws of the United States over the territory. No such extension had been made in the case of Alaska.

But says the court in the Rasmussen decision, "The act or acts of Congress purporting to extend the Constitution (in cases cited) are considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution." The conclusion of the court rests upon the self-operative application of the Constitution. Territory which has been accorded the treatment of an integral part of the United States is distinguished from territory not so treated. Both may be considered part of the United States but in a different sense. In the former class, the inhabitants are entitled to the guarantees of the Fifth, Sixth and Seventh Amendments. Extension of the Constitution is not necessary in such a class for it has

- #1- Am. Pub. Company v Fisher, 166 U.S. 464
- Thompson v Utah, 170 U.S. 343
- Springfield v Thomas, 166 U.S. 707
- Capitol Traction Company v Hof, 174 U.S. 1

already been extended "~~ex~~proprio vigore" thru incorporation proceedings.

#1

In Thompson v Utah the court held trial by jury to be an inherent right of the territories, "That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the territories of the United States is no longer an open question." Viewed in the light of the Rasmussen case, this must be qualified by the words, "if organised or incorporated." Utah was not allowed to substitute a jury of eight for the common law jury being an organised territory and Alaska was permitted the jury provisions of the Constitution, being incorporated. But, as laid down in the Rasmussen case by Justice White, the test of the application of the constitutional guarantees is not organisation of the territory but its incorporation. Accordingly, there is no reason why the division of territory into organised and unorganised, be longer retained. Territory is recognised by the Supreme Court as belonging to either of the two classes, incorporated and non-incorporated. The provisions of the Constitution extend to incorporated territory "ex proprio vigore." In non-incorporated territory, civil rights await the decision of Congress as to the wisdom or need of extension.

Justice Brown concurring, dissents vigorously from the reasoning applied in the reaching of the decision. At some length he defines his position on the incorporation doctrine. As Justice Harlan found a "new doctrine in our constitutional jurisprudence" the opinion of Justice Brown that the benefits of the jury clauses in the Constitution were not fundamental in their nature, so Justice Brown declares

#1- Thompson v Utah, 170, U.S. 343.

#2- Dorr v U.S. 583, U.S.

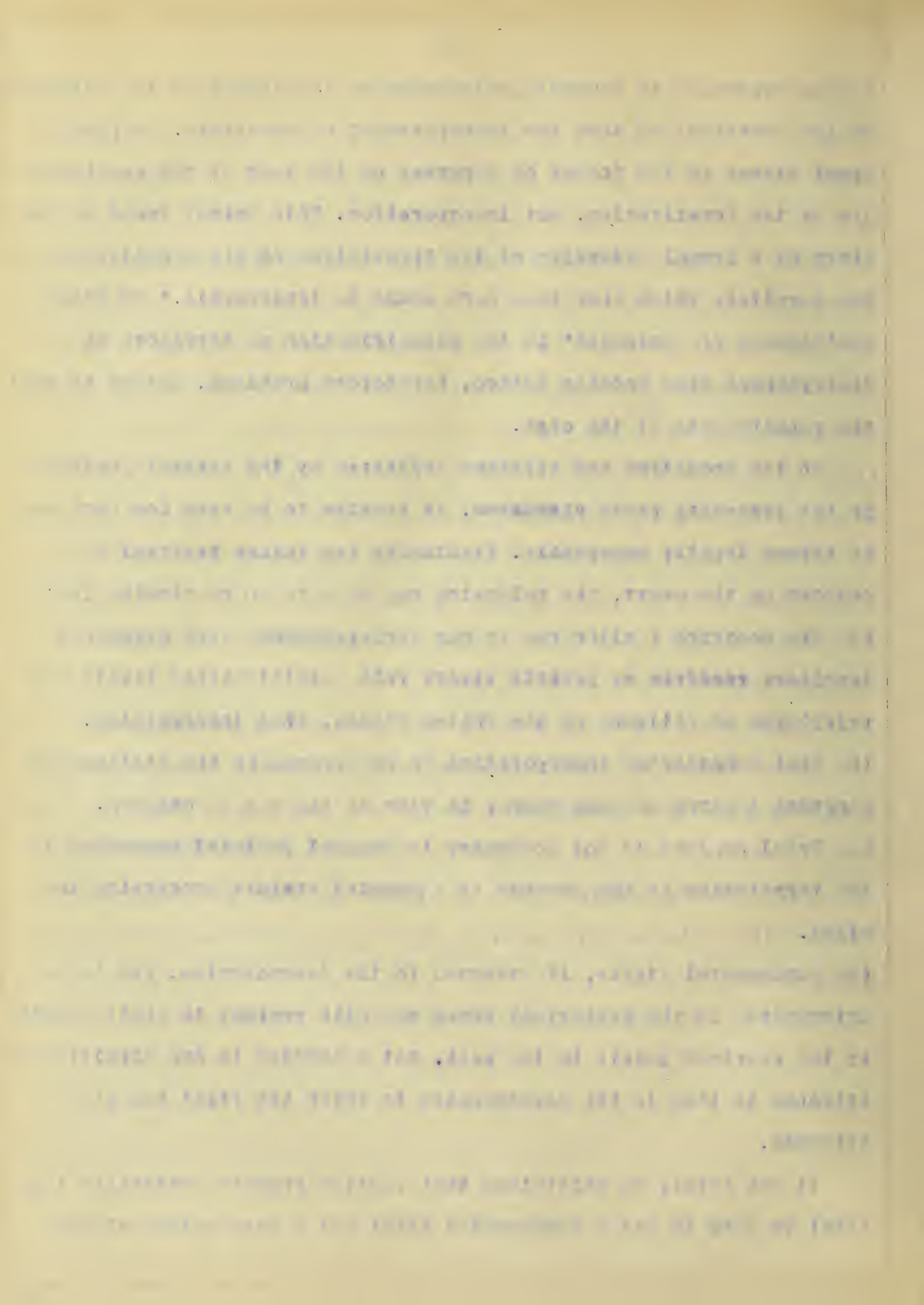
#3- Rasmussen v U.S., 51 U. S.

a "new departure in federal jurisprudence" the theory of the extension of the Constitution thru the incorporation of territory. He places great stress on the intent of Congress as the test of the applicability of the Constitution, not incorporation. This intent would be best shown by a formal extension of the "provisions of the Constitution to the territory which when once done would be irrevocable." He finds a new "element of confusion" in the classification of territory as incorporated when another method, heretofore provided, seemed to meet the requirements of the case.

In the decisions and opinions delivered by the several justices in the preceding cases discussed, it remains to be seen how much may be termed legally acceptable. Precluding any future reversal of opinion by the court, the following may be said to be binding law:-

- (1) The doctrine (altho new to our jurisprudence) that dependent territory ~~receives~~ *ex proprio vigore* full constitutional rights and privileges of citizens of the United States, when incorporated.
- (2) What constitutes incorporation is determined by the attitude of Congress towards the dependency in view of the act of cession.
- (3) Trial by jury is not necessary to Federal judicial procedure in the territories in the absence of a special statute conferring the right.
- (4) Fundamental rights, if extended to the dependencies, are to be interpreted in the historical sense and with respect to their meaning to the American people in the past, not according to any significance attached to them in the dependencies to which the right had been extended.

It can hardly be maintained that Justice Brown's contention that trial by jury is not a fundamental right but a mere method of pro-



-cedure, is law altho concurred in by a majority of the justices as a basis for the decision in Dorr case. The action of the justices is explained by the desire to have the decision in the Dorr case rest upon the decision in the Mankichi case.

Among the dependencies of the United States there are here and there a number of islands classed as "appurtenant territory," the so-called Guano Islands. We have no opinion respecting the constitutional status of such dependencies. In the case of Duncan v Navasse #1 Phosphate Company a decision was had upon a claim to dower in the right to exploit a certain guano island. The court said, " Congress has not legislated concerning any civil rights upon guano islands; but has left such rights to be governed by whatever laws may apply to to citizens of the United States in countries which have no civilised government of their own." This clause is susceptible of further interpretation.

We see, therefore, that while the civil rights of the people of the United States are found in a written instrument in which may be read the principles that govern the nation, the law of the dependencies is largely unwritten and the civil status of such territory and the rights of the people there, are hidden in what the Supreme Court of the United States interprets to be due their political and social development.

#1- Duncan v Nav Phos. Company, 137 U.S. 647.

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